IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUNSON COMMUNICATIONS, INC.,	:	
Plaintiff	:	
	:	**NO. 02-CV-3223**
v.	:	
	:	
ARBITRON, INC.,	:	
Defendant	:	

PLAINTIFF S MOTION FOR RECONSIDERATION AND CLARIFICATION IN PART

PursuantPursuant to Local Rule of Civil Procedure Rule 7.1(g), plaintiffplaintiff Brunson Communications, Inc., plaintiff Brunson Commu reconsiderationreconsideration and reconsideration and clarifreconsidera December 31, 2002 Opinion and Order, and avers in support thereof as follows:

1.1. A party may file a motion for reconsideration1. A party may fi enentryentry of a judgment, order or decree, pursuant to Locaentry of a j Civil Procedure 7.1(g).

2.2. Courts will reconsider, alter or amend a judgment or reconsiderreconsider an issue when there is ... the emergence of ne evidence not previously available, or the need to correct a clear errorerror of law or to prevent a manifest injustice. General InstrumentInstrument Corp. v. Nu-Tek Elecs. & Mfg., 3 F.Supp.2d 602, 606 (E.D.Pa.(E.D.Pa. 1998)(E.D.Pa. 1998), *aff aff d*197 F.3d 83 (3d Cir. omitted);omitted); See also, Harsco Corp. V. Zlotnicki, 779 F.2d 906, 909

(3d(3d Cir. 1985), *cert. denied*, 476 U.S. 1171, 476 U.S. 1171 (1986), 476 U.S
a motion for reconsideration is to correct manifest errors of law
or fact or to present newly discovered evidence").

3. In determining a motion to reconsider, "the court should keep an open mind, and should not hesitate to grant the motion if necessarynecessary to preventnecessary to prevent manifest necessary to p
Sportswear Co. v. Victoria s Secret Stores, 2001 WL 881718, *1
(E.D.Pa. May 1, 2001).

4.4. Herein plaintiff requests reconsideration and clarification ofof this Court s Decemberof this Court s December 31, 2002 Orderof this Co
MotionMotion to Dismiss withouMotion to Dismiss without leaMotion to Dismi
LLanhamLanham Act claims and two of the common law claims, aLanham Act cl
prejudice to plaintiff s right to file a Second Amended Complaint
as to the claims for negligence and disparagement.

5. The discovery ordered by the Court was excluded from consideration,consideration, pursuant to the Court s discretion. Howeve
addition,addition, plaintiff was denied the opportunity toaddition, plain
some counts based, according to the Court, in part on the failure
of plaintiff to request an opportunity for leave to amend.

6. While the Court has discretion to exclude or include discovery that it had directed be taken, plaintiff was entitledentitled to assuentitled to assume thaentitled to assume that the
thethe discovery. Subsequent to the Amended ComplainSubsequent to the Ame

information was developed in the course of discovery, the absence ofof which had been described by the Court as a motivating factor in its decision to allow such discovery.

77.7. B7. By way of this court-ordered discovery, defendant Arbitron,Arbitron, byArbitron, by and through its witness, testified thatArb ofof plaintiff fromof plaintiff from the survey was intentional, and notof p AtAt his deposition, Kevin SmithAt his deposition, Kevin Smith, a S Arbitron,Arbitron, testArbitron, testifieArbitron, testified that he beli MarchMarch 2002 because Arbitron did March 2002 because Arbitron did connectconnect all stations; the stations included in the survey were thosethose which had been included in an earlier Wilmington survey, and threethree others for which Arbitron had equipment. (Deposition of KevinKevin Smith, 11/07/02, at 32-36). If true, Mr. Smith s statements ssuggsuggestsuggest three significant facts: 1) Arbitron chose to offer i limitedlimited supply of equipment to other stations rather than WGTW; and 2)2) Arbitron s public statements regar2) Arbitron s public statemen accuracyaccuracy of the survey were made with the knowledge of their falsitfalsity;falsity; anfalsity; and 3) his statement on May 20, 2002 cla channelschannels had been included misled the industry to believe all stationsstations istations in the stations in the Philadelphia market were (See Duffin Affidavit, ¶7).

8. This enhances plaintiff s common law claims, 8. This enhar enhancesenhances the suspect nature of defendant s conduct as it relates to

thethe anti-trust motivational aspects,the anti-trust motivational aspects, Court. In light of the Court s decision, unknown to the parties, notnot to include consideration of thenot to include consideration of the amend to give plaintiff the opportunity to address these enhanced argumentsarguments is reasonable. However, the Court did not grantarguments amendamend on the aamend on the antiamend on the antitrust claims, ar seeking leave to amend.

9. In fact, plaintiff had sought leave to amend in its answeranswer to defendant s Motion to Dismiss (Brief, at 20), and assumed, as is common, that the Court would liberally grant leave toto amend sua sponte. See Heyl & PattersonHeyl & Patterson Int l, Inc. vHe Housing Virgin Islands, Inc., 663 F.2d 419 (3d Cir. 1981)(stating thatthat the policy of Fed.R.Civ.P. Rule 15(a) is to liberally grant leaveleave to amend the pleadings). The discovery in thisleave to amend the p wisdomwisdom of liberally allowing amendment. To the extent that plaintiffplaintiff has not done so up to now, plaintiff should be allowed to seek leave at this time. The Statute of Limitations has not run, andand defendant would not be prejudiced by allowing a second amended complaint.complaint. Multiple amendments are common in complicated anti- trutrusttrust matters, as well as complex commercial situations, atrus plaintiff s knowledge of the facts is evolving.

10. Plaintiff has developed, from the website of defendant Arbitron,Arbitron, as well as the testimony and exhibits produced by

Arbitron, more of the nature of the relationship between Arbitron andand Neilsoand Neilson. and Neilson. This information was summari discoverydiscovery submission to the Court in paragraphs 5 and 6. AAs stated,stated, plaintiff is now in possession of instated, plaintiff is no thethe intentionthe intention of Neilson and Arbitron tothe intention of Nei Court may recall that this was advanced in oral argument, but was denieddenied and characterizeddenied and characterized divisively by counsel oraloral arguments. The action of Arbitron and Neilson, therefore, is subjectsubject to being treatedsubject to being treated as that of a singles law purposes. (Plaintiff s Brief, pages 8-9).

11.11. In its Opinion, the Court held that a single product can nevnevernever be the subject of a market, but the United Statesnever be t CourtCourt held otherwise in the DuPont case, cited by plaintiff at Brief, page 7, as well as in oral argument. See United States v. E.I.E.I. Du Pont Nemours & Co., 351 U.S. 377 (1956)(When a product is contcontrollcontrolledcontrolled by one interest, without substitutes avai market, there is monopoly power.);see also Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359(1927).

12.12. 12. While it is true that plaintiff did not file a12. While it i leave to file an amended complaint after oral argument, plaintiff waswas complying with the Court s directive as twas complying with the Co directivedirective which was given to the parties at oral argument; and reasonablyreasonably assumed its request for leave wareasonably a

articulated, and that the discovery product would be considered.

13.13. By way of13. By way of request for clarification,13. By way of informationinformation justifies the adinformation justifies the addiin installation, which was not alleged in the amended complaint, as wellwell as a claim for reckless disregard of rights in Pennsylvania law.law. Plaintiff believes that Pennsylvania law clearly supports bothboth oboth of these claims, where Arbitron held itself out a authoritative,authoritative, and heldauthoritative, and held its information full knowledge that plaintiff was omitted.

14. The Court did not indicate clearly whether plaintiff s amendedamended complaint, permitted by the Court, would be limited to the amendmentamendment of theamendment of the previous counts for negligenceamen or whether plaintiff could add new counts.

15. Plaintiff requests clarification, as to whether an additionaladditional motion is necessary to allow additional counts, or whetherwhether they should bewhether they should be included in the upcoming

WHEREFORE,, plaintiff requests that the Cou, plaintiff requests that decisiondecision insofar as the Court excluded the Sherman Act claims with prejudice, and allow an amended complaint as to them; and clarify thatthat plaintiff may add additional negligence claims (whether as separateseparate counts or otherwise) relating to differenseparate counts

andand different conduct of the defendant, within the scope of the Court s Order.

ROBERT J. SUGARMAN
Counsel for Plaintiff

OF COUNSEL:

SUGARMAN & ASSOCIATES
11th Floor, Robert Morris Building
100 North 17th Street
Philadelphia, PA 19103
(215) 864-2500

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